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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1301

UNITED STATES OF AMERICA, ET. AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS,
Appellee,

and

STANLEY K. HATHAWAY, ET AL.,
Appellants,

VERSUS

DOROTHY FRAZIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

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The Appellees, Wanda June Weeks, Dorothy Frazier and Ruth Rattler, individually and as members of the Kansas Delaware class, move the Court to dismiss the appeal filed herein by the Appellants, the members of the Cherokee Delaware class, for the reasons that the questions presented in the Jurisdictional Statement filed herein are not presented by this case.

This Court is asked by the Appellants to issue an advisory opinion and to decide abstract questions of law. The matter presented for review was not decided by the District Court in such a manner as to be a predicate for the presented questions. The District Court did not decide that the subject funds were tribal assets. Its holding was based upon its finding that the funds were to be distributed to individuals on a per capita basis without regard to any present tribal affiliations. That the District Court erred in so treating the funds is not presented as a question. The Jurisdictional Statement merely *assumes* that such funds were tribal assets and that the recipients were all members of presently recognized Indian tribal entities. Its argument is then based on the assumption that this is a dispute between non-tribal Indians on the one hand and tribal Indians on the other.

The Appellants, in their Conclusion, state the question to be whether the Courts can, or should, question the *wisdom* of Congressional decisions as to how funds for Indians are to be distributed. The "wisdom" of Congress in this matter is not in issue. At the trial, the Cherokee Delaware class urged that in Indian affairs, Congress can do anything that it pleases to do. The District Court held that the Due Process Clause of the Fifth Amendment prevents invidious discrimination between classes with equal standing. The fact that the members of each class were of Indian descent did not, it is submitted, deprive the Court of jurisdiction to apply time-honored standards to determine whether the discrimination violated the Due Process rights of the parties, and finding that such rights were violated, to declare the legislation unconstitutional.

ARGUMENT

The challenged statute (86 Stat. 762, 763, 25 U.S.C. §§1291-97) provides for distribution of funds appropriated to pay an award entered in the Indian Claims Commission for a breach of the 1854 treaty between the Delaware Tribe and the United States (10 Stat. 1048) (Appendix 98a). That statute provided that the funds to be distributed under Section 1292 are to be paid to individuals on a per capita basis according to a roll to be prepared for such purpose by the Secretary of the Interior. To be eligible to be placed on such roll, it is provided that a person must have been born on or before October 3, 1972, must be a citizen of the United States and his name or the name of a lineal ancestor must be on either (a) the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (b) his name or the name of a lineal ancestor must be on or be eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

The above criteria, it should be noted, make no reference whatever to such persons having any tribal relationship with any tribe. The distribution is provided to be on a lineal descendancy basis to individuals, not tribes, and wholly without regard to whether such persons have, or have ever had, any continued membership. The "Delaware per capita payroll" referred to was not a tribal roll. The constructed base census roll of 1940 (Absentee Delaware Roll) was not a tribal roll and, if it was, it was not required that recipients be on such roll if they had an ancestor who was eligible to be on such roll. The Absentee tribal

constitution requires that tribal members be of at least 1/8th Absentee Delaware blood. Hence, all persons qualifying for payment who have less than 1/8th Absentee Delaware blood are not eligible to be tribal members.

This discussion of the challenged statute is necessary for an understanding of the fallacies in the Jurisdictional Statement filed in this appeal.

In their Jurisdictional Statement, the Appellants herein make certain misleading references to the distribution Act in question. These references are as follows:

Page 3, Line 18	". . . should be distributed solely to those currently holding citizenship in the Delaware Nation . . ."
Page 5, Line 9	". . . Delawares who maintained their tribal citizenship through the 'Delaware Indian Tribe' or the 'Absentee Delaware Tribe' . . ."
Page 10, Line 3	". . . 90 percent on a per capita basis to tribal members . . ."
Page 10, Line 32	". . . only to, or for the benefit of, tribal members . . ."
Page 11, Line 23	". . . are tribal citizens . . ."
Page 12, Line 1	". . . members of the tribe . . ."
Page 14, Line 8	". . . on the basis of membership in Delaware social-political groups . . ."
Page 14, Line 16	". . . tribal Delawares . . ."
Page 15, Line 7	". . . what is clearly tribal property. . . ."
Page 15, Line 19	". . . tribal nature of Indian property. . . ."

Page 15, Line 25	". . . to recognized Indians . . ."
Page 16, Line 3	"The decision to distribute only to Delaware nationals . . ."
Page 16, Line 13	". . . to tribal citizens . . ."
Page 17, Line 18	". . . as tribal Delawares . . ."

The above references betray the lack of understanding by the Appellants of the individual, not tribal, nature of the distribution. The discussion of the questions presented by the Appellants is based wholly upon the assumption that the distribution statute limited payments to only "tribal" members when it is obvious that there is no such limitation.

This case involved the simple question of whether, if Congress elects to distribute funds on a lineal descendancy basis, it may discriminate between classes of lineal descendants on a basis that is rationally unrelated to the purpose of the distribution. The District Court, in holding that Congress could not so discriminate, applied the standards approved by this Court in a long line of cases under the Due Process component of the Fifth Amendment. No new or novel question is presented for review.

No contention is made that Congress does not have the power to appropriate and distribute public monies to Indian tribes. Congress, in this instance, did not appropriate and provide for distribution of these funds to an *Indian tribe*, but to individual lineal descendants, not of tribal members, but of persons on two rolls, neither of which were tribal rolls. The utilization of these rolls as a means of tracing ancestry is not questioned here.

The Indian Claims Commission Act provides for claims to be made by tribes, bands or other identifiable groups (25

U.S.C. §70(a), 60 Stat. 1050). It is recognized that claims may not belong only to tribes or bands of tribes. Where there is an identifiable group whose ancestors were members of an Indian tribe at the time of the wrong, the Court of Claims has recognized the right of such persons to share in an award for such wrong, even though they are not organized, since they would not benefit at all from an award to the organized tribe. *McGhee* v. *United States*, 122 Ct.Cl. 380, 388, 396 (1952), *cert. den.*, 344 U.S. 856, 73 S.Ct. 91, 97 L.Ed. 665; *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 271, note 12.

The Appellants' reasoning in their arguments in support of the substantiality of the questions presented in their Jurisdictional Statement, insofar as they are based upon their ill-conceived understanding that these funds belong to "recognized tribes" and is ordered distributed to "members of such tribes," fails by virtue of the real nature of the funds and the distribution plan.

There are other references in the argument in support of the substantiality of the questions presented which mislead the Court. On page 8 of the Jurisdictional Statement, the Appellants state that "[t]he Delaware tribe is a continuing quasi-sovereign entity." The challenged statute in Section 1294(b) provides that no funds which are to be placed to the credit of the tribe in the United States Treasury are to be used "until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members." Obviously, no such entity existed which could be said to have had a quasi-sovereign status. The historical facts in this case show that the Delaware Tribe as a sovereign entity was abolished in

1867 and the members were absorbed into the Cherokee Nation. *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 646 (1904). Since 1896, the only function of the Business Committee formed by the Cherokee Delaware Band of the Cherokee Nation has been to present claims against the Government. It is a gross distortion of the facts to state that the Delaware Nation is an existing tribe with sovereign immunity in any real sense.

The Appellants, throughout their arguments, refer to the Kansas Delaware class as descendants of expatriated tribal members without reference to the fact that this class is also descendant from minor members of the tribe of 1866 who never resigned from the tribe and never relinquished any rights. The Appellants also fail to refer to an Act of 1875 (18 Stat. 410, 43 U.S.C. §189) which restored to Indians any rights which they may have given up by having theretofore abandoned their tribal relations. This effort to portray the Kansas Delaware class as persons whose rights have been lost through the historical events since the wrong in 1854 can mislead this Court into its understanding of the equal footing which the members of this class have with the other lineal descendants of members of the tribe in 1854.

The Appellants, on pages 9 and 10 of their Jurisdictional Statement, say that the District Court inquired into the "motives" of Congress in enacting the challenged distribution Act.

The Appellants contend that the Congress deliberately and with knowledge that it was excluding the Kansas Delaware class changed the distribution plan from one utilized for a prior distribution to Delaware Indians. The District

Court searched the legislative history and determined that this contention was wholly without merit (Appendix, pages 31a through 35a). To make it clear that this was the purpose of such inquiry into legislative history, the District Court appended to its opinion as Appendix A a portion of the transcript of hearings before Congressional Subcommittees. This transcript shows that there was no deliberate exclusion of the Kansas Delawares. The change upon which the Appellants rely was wholly and totally unrelated to the Kansas Delawares, but related to a group known as Munsee Indians. The District Court discussed this matter in full in its opinion and it is not correct to represent to this Court that "motives" were the basis for the legislative history search. Further, it is wrong to assert, as the Appellants do on pages 10 and 11, that Congress enacted the challenged statute "knowing full well that it was excluding expatriate Delawares." The record amply supports the finding by the District Court that Congress "was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of excluding a group of people, such as the Kansas Delawares, who were unquestionably lineal descendants of the Delaware Nation in 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe" (Appendix, page 33a, note 29).

The Appellants, on page 14 of their statement, state that the Kansas Delawares "did not surface in these proceedings until after the Indian Claims Commission had acted (after protracted hearings), Congress had acted (after hearings), and chance of obtaining a cash windfall had appeared."

The record in this case shows that the Chairman of the Business Committee of the organization which calls itself the Delaware Tribe of Indians from 1924 to 1951 was a member of the Kansas Delaware class. He was the individual who employed the attorney who filed the Indian Claims Commission suits. On July 14, 1951, at the time of his resignation, the General Council of this organization recognized by resolution that he and other Kansas Delawares were entitled to share in all tribal assets.

The Appellants herein (as the Absentee Appellants in Case No. 75-1335 in this Court) rely heavily for their case on the dissenting opinion of Judge Daugherty. They even suggest that this Court reverse the District Court based upon such opinion and their statements in their arguments. The Appellees in their motion to dismiss the appeal of the Absentee class in the appeal docketed as No. 75-1335 present an analysis of the dissenting opinion and the errors relied upon by Judge Daugherty. These Appellees request this Court to also consider such analysis, contained in the Conclusion of such motion, as also offered in support of this motion.

CONCLUSION

This Court, in *Baker* v. *Carr*, 369 U.S. 186, 216, 217, 82 S.Ct. 691, 709, 710, 7 L.Ed.2d 663 (1962), said:

> "While '"It is for [Congress] * * *, and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage" * * *, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe * * *.' United States v. Sandoval, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107. Able to discern what is 'distinctly Indian,' ibid., the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."

We submit that it would be equally violative of the constitutional rights of excluded lineal descendants of Delaware Indians for the Court to treat property, which Congress has appropriated and provided for distribution to individuals, as "tribal property" when it is not; to consider the business organization which calls itself the Delaware Tribe of Indians as a tribe with sovereign immunity and to deny jurisdiction on the basis of such immunity when no such sovereign or quasi-sovereign tribal unit exists; or to consider two rolls as tribal rolls when they were not and to exclude persons whose ancestors do not appear on such rolls as non-tribal members and on such basis deny them a share in an award to which they clearly can show rights equal to the rights of those whose ancestors' names do appear on such rolls.

The District Court, in an exhaustive and fully documented opinion, found that there was an invidious discrimination against the Appellees. The Appellants offer no substantial questions for this Court to consider in a review of such decision. Certainly, the effort by the Appellants to present the issues in this action as being "intra-tribal" or relating to the administration by the Government of its guardianship duties to unemancipated Indians, or concerning "tribal properties" should not afford a basis for the consideration of the questions presented.

We respectfully submit that the above appeal should be dismissed for lack of presentation of substantial questions.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Messrs. Watts, Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119, counsel of record for Cherokee Delaware class and named individual members thereof; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard

Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of ....., 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

.....

Delmer L. Stagner